



INTERIOR BOARD OF INDIAN APPEALS

Estate of Earl Sanford Howe, Jr.

53 IBIA 3 (01/07/2011)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF EARL SANFORD)	Order Dismissing Appeals
HOWE, JR.)	
)	
)	Docket Nos. IBIA 11-024
)	11-025
)	11-026
)	
)	January 7, 2011

Johnnie E. Howe-Mendoza, Jeanine R. Howe Sfragidas, and Vivian D. Howe (Appellants), appealed to the Board of Indian Appeals (Board) from a September 9, 2010, Order Dismissing Petition for Rehearing (Rehearing Order) entered by Administrative Law Judge (ALJ) Richard L. Reeh in the estate of Appellants' father, Earl Sanford Howe, Jr. (Decedent), deceased Ponca Indian, Probate No. P000064228IP. The Rehearing Order was limited to dismissing a request for compensation that was filed by Decedent's former wife, DeLoyce Decorah.¹ Appellants do not challenge the Rehearing Order, but instead seek to challenge the underlying Order Determining Heirs, from which Appellants did not seek rehearing from the ALJ, and which found that Martha Fryer was one of Decedent's children and an heir. Appellants question Decedent's paternity of Fryer and seek intervention by the Board, through this appeal, to allow them time to conduct DNA testing before the Order Determining Heirs becomes final.

As relevant to this case, the Board's authority is limited to reviewing orders on petitions for rehearing, and because the substance of Appellants' appeals is outside the scope of the Rehearing Order, the Board ordered Appellants to show cause why these appeals should not be dismissed. Appellant Howe-Mendoza did not respond, and therefore we dismiss her appeal (Docket No. IBIA 11-024) for failure to prosecute. Appellants Sfragidas (Docket No. IBIA 11-025) and Howe (Docket No. IBIA 11-026) responded, but their

¹ The Order Determining Heirs and Decree of Distribution (Order Determining Heirs) was issued on August 16, 2010. Decorah did not challenge the ALJ's heirship determination, but requested that she be compensated from Decedent's estate for child support payments. The ALJ rejected Decorah's petition because her claim was time-barred and, even if her claim were viable, there were no assets available for payment.

responses confirm that their appeals are outside the scope of review for the Rehearing Order, and therefore we dismiss their appeals as well.

Discussion

During the original probate proceedings, some of Decedent's family members questioned Fryer's paternity, and the ALJ continued the matter in order to allow the parties an opportunity to conduct DNA testing.² In the Order Determining Heirs, the ALJ found that the case had been continued for more than 3 months, neither the results from DNA testing nor a motion for a further continuance had been submitted by any party, and the evidence weighed in favor of finding that Fryer is a biological child of Decedent. The ALJ found that Decedent had five children, including Fryer, and ordered the distribution of Decedent's interests in trust property to them as his heirs. Appellants did not seek rehearing from the Order Determining Heirs. But after Decorah sought rehearing in order to submit her monetary claim, and after the ALJ dismissed Decorah's request, Appellants appealed to the Board, seeking additional time to conduct DNA testing.

On October 26, 2010, the Board ordered Appellants to show cause why their appeals should not be dismissed as outside the scope of review for the Rehearing Order. We explained that

[t]he scope of the Board's jurisdiction over appeals in Indian probate matters is set forth in 43 C.F.R. §§ 4.318 and 4.320: We may hear appeals from *orders on petitions for rehearing*, petitions for reopening, purchase of interest(s) in an Indian decedent's estate, or from a modification order. *See Estate of Caroline Davis*, 51 IBIA 101 (2010). Further, "[i]t is well established that the scope of probate appeals before the Board is limited to the issues presented to the probate judge." *Estate of Alfred Chalepah, Sr.*, 51 IBIA 148[, 148] (2010) (citing 43 C.F.R. § 4.318).

Pre-Docketing Notice, Order Consolidating Appeals, Order to Complete Service, and Order to Show Cause, at 3. The Board advised Appellants that if they failed to respond to the Board's order, their appeals might be summarily dismissed without further notice. *Id.* at 3-4.

² Neither a probate judge nor the Board presently has authority to order persons to submit to DNA testing. *Estate of Gordon Lee Ward*, 51 IBIA 88, 93 (2010); *Estate of Earl Cheyenne*, 48 IBIA 205, 208 (2009); *Estate of Foster Gregorio Marruffo*, 45 IBIA 149, 150 n.3 (2007). Parties may, of course, voluntarily undergo such testing.

The Board has received no response from Appellant Howe-Mendoza. Thus, we dismiss her appeal for failure to prosecute. *See Estate of Reginald Paul Walkingsky*, 52 IBIA 233, 234 (2010); *Estate of William A. Hamilton, Sr.*, 52 IBIA 161, 162 (2010).

Appellants Sfragidas and Howe responded to the Board's show cause order, but they fail to show that their appeals fall within the scope of the Board's review. On the contrary, their responses make clear that they do not challenge the Rehearing Order, which addressed only one issue — Decorah's request for compensation. Instead, their appeals are directed at the ALJ's Order Determining Heirs, in which the ALJ recited the allowance he had made for parties to conduct DNA testing and — in the absence of receiving any DNA results or a motion for a further continuance — in which he determined that Fryer is a biological child of Decedent.

Apparently recognizing that she was required to first raise her challenge in a petition for rehearing, Sfragidas's response to the Board asks the Board to grant a rehearing from the Order Determining Heirs, along with additional time to complete DNA testing. *See* Letter from Sfragidas to Board, received December 16, 2010; *see also* Letter from Howe to Board, Dec. 7, 2010 (requesting that Appellants be provided at least 90 days to do DNA testing). The Board, however, does not have jurisdiction to consider petitions for rehearing. If Appellants wished to challenge the ALJ's Order Determining Heirs, it was their responsibility to *first* raise their concerns regarding Fryer's paternity and their requests for additional time to complete DNA testing with the ALJ — not with the Board — through a petition for rehearing within the 30-day time period allowed.

Because Sfragidas and Howe do not allege any error in the Rehearing Order and because they did not raise any objections with the ALJ following his issuance of the Order Determining Heirs, their appeals are outside the scope of the Board's review. *See* 43 C.F.R. § 4.318. *See Estate of David Martin Champagne*, 49 IBIA 209, 210 (2009) (dismissing appeal as outside the scope of the Board's review).

As noted in the Board's order to show cause, 43 C.F.R. § 4.318 includes an exception under which the Board can, in extraordinary circumstances, address matters outside the normal scope of review. But no such circumstances are present here. An appeal to the Board is not an appropriate vehicle for Appellants to delay the finality of the Order Determining Heirs in order to allow them additional time to gather evidence, particularly when they did not seek additional time from the ALJ during the original probate proceedings or file a timely petition for rehearing with the ALJ. "It is not the function of this Board to provide the parties further opportunity to obtain documents and evidence for

use in a probate proceeding that has already occurred.” *Estate of Chalepah*, 51 IBIA at 148 (citation omitted).³

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses Howe-Mendoza’s appeal for failure to prosecute and dismisses Sfragidas’s and Howe’s appeals because their challenges are outside the scope of the ALJ’s Rehearing Order.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

³ We express no opinion on whether reopening of the estate might be appropriate if Appellants obtain the desired DNA testing. The regulations governing petitions to reopen closed estates are found at 43 C.F.R. §§ 30.242-30.245. Petitions for reopening must satisfy the requirements of those regulations and must be submitted to the probate judge.